

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JUL 10 2007

COURT OF APPEALS
DIVISION TWO

IN RE THE MATTER OF BOND
FORFEITURE IN AMOUNT OF
\$10,000.

) 2 CA-CV 2006-0098

) DEPARTMENT A

) MEMORANDUM DECISION

) Not for Publication

) Rule 28, Rules of Civil

) Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200500671

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Rene Guerrero

Phoenix
In Propria Persona

Edward G. Rheinheimer, Cochise County Attorney
By David R. Pardee

Bisbee
Attorneys for Appellees

P E L A N D E R, Chief Judge.

¶1 Appellant Rene Guerrero, doing business as Azteca Bail Bonds, challenges the trial court's order forfeiting an appearance bond he had posted on behalf of a criminal

defendant. Guerrero contends “the trial court abused it[]s discretion . . . when it did not exonerate all or part of the bond.” Finding no error, we affirm.

BACKGROUND

¶2 On appeal from a bond forfeiture, we view the facts “in the light most favorable to supporting the trial court’s judgment.” *In re Bond Forfeiture in Pima County CR-20031154*, 208 Ariz. 368, ¶ 2, 93 P.3d 1084, 1085 (App. 2004). In September 2005, Guerrero posted a surety bond in the amount of \$10,000 on behalf of criminal defendant Gerardo Pedroza. After Pedroza failed to appear for his arraignment, the trial court issued a bench warrant. Approximately three months later, the court ordered a hearing on the state’s application for an order to show cause why the surety bond should not be forfeited.

¶3 At the bond forfeiture hearing, Guerrero explained that he had “tried to turn [Pedroza, a Mexican citizen,] in to U.S. Customs at the point of entry” but that the border agents “didn’t want to let [Pedroza] in because he had involuntarily entered the country.” Guerrero further claimed that while U.S. Customs agents held Pedroza, he contacted the Douglas Police Department (DPD), but it had “decided not to arrest [Pedroza].” Guerrero requested “a full and fair hearing” to interview the various officers who had essentially “sen[t] [Pedroza] back to Mexico.” Despite the state’s contention that Guerrero’s efforts in obtaining Pedroza had no bearing on the forfeiture proceedings, the trial court “allow[ed] [Guerrero] an opportunity to present whatever evidence [he] ha[d]” and “[c]ontinued” the hearing for two weeks.

¶4 At the continued hearing, Guerrero questioned a DPD officer who had responded to a U.S. Customs request to arrest Pedroza at the border. The officer testified that Guerrero had shown him a “copy of the bond,” but “[t]here was no warrant.” He stated that he had “checked [for a] warrant,” that there was none in the system, and that without a warrant, “there was not much that [DPD] could do.”

¶5 Following testimony, the trial court noted that in determining whether a defendant’s absence is excusable, it must look at “the defendant’s actions,” not “the bail bondman’s actions.” The court found that Pedroza’s flight to Mexico presented “a situation in which the actions of the defendant in failing to appear [we]re inexcusable” and “forfeit[ed] [Guerrero’s] bond . . . in its entirety.” On March 8, 2006, the trial court entered an order of forfeiture against Guerrero in the amount of \$10,000.

¶6 After filing a notice of appeal from that “order and judgment,” Guerrero filed in the trial court a motion for an evidentiary hearing based on newly discovered evidence. After this court granted Guerrero’s “Motion for Revestment of Jurisdiction in [the] Trial Court for Specific Purpose of Hearing,” an evidentiary hearing was held on Guerrero’s motion.

¶7 The only newly discovered evidence Guererro presented was “there was a telephone call between the Port [of Customs] and [the] Sheriff’s Office at some point [while Pedroza was in Customs’ custody,] confirming that there was a warrant.” Guerrero did not counter the state’s position that despite “a telephone call between the Port and [the]

Sheriff's Office," the DPD officer who had responded to the Customs call "was[not made] aware of [the warrant]." Rather, counsel for Guerrero simply asked the court to reconsider "its discretion under the[] facts." After taking the matter under advisement, the trial court denied Guerrero's motion for an evidentiary hearing, which it "deemed . . . a Motion for New Trial." Following that ruling, the stay of the appeal was vacated and jurisdiction was revested in this court.

DISCUSSION

¶8 Guerrero argues the trial court's forfeiture of his entire bond was an "abuse [of] discretion" because the trial court failed to "use or properly weigh" his efforts in trying to produce Pedroza and other mitigating factors. "We review the trial court's order forfeiting the bond for an abuse of discretion." *State v. Garcia Bail Bonds*, 201 Ariz. 203, ¶ 5, 33 P.3d 537, 539 (App. 2001).

¶9 Under Rule 7.6(c)(1) and (2), Ariz. R. Crim. P., 16A A.R.S., a trial court has discretion to forfeit "all or part of the amount of [a surety] bond" when a criminal defendant "has violated a condition of [the] bond" and the violation "is not explained or excused." As the trial court noted below, in determining whether a defendant's absence is excusable, a court measures "the defendant's actions," not "the bail bondman's actions." *See Garcia Bail Bonds*, 201 Ariz. 203, ¶ 12, 33 P.3d at 540 ("[W]here a defendant's non-appearance is due to his own fault, the surety is not entitled to relief . . .").

¶10 As Rule 7.6 also makes clear, even when a defendant’s actions are not excusable, a trial court has discretion to determine whether to exonerate all or part of a surety bond. In *State v. Old West Bonding Co.*, 203 Ariz. 468, ¶ 26, 56 P.3d 42, 49 (App. 2002), Division One of this court enumerated several factors “that might bear on the court’s discretionary decision whether, and in what amount, to forfeit an appearance bond.” Those factors included “the surety’s effort and expense in locating and apprehending the defendant” and “other mitigating or aggravating factors.” *Id.*

¶11 As noted above, Guerrero argues the trial court “did not use or properly weigh the effort and expense [he] expended [in] locating the fugitive defendant in a very dangerous risky situation in Mexico.” But, in considering the seven factors set forth in *Old West*, the trial court did acknowledge that Guerrero had “tr[ie]d to entice [Pedroza] across [the border]” and that “there [had been] effort.” Again, when it considered any mitigating factors, the trial court noted that Guerrero “did make efforts” and “commend[ed] [him] for that.” Still, after weighing all the factors, the trial court found “in favor of forfeiting the bond . . . in its entirety.”

¶12 Guerrero points to this court’s statement in *Pima County CR-20031154* that “the surety [had not] demonstrated that it expended any effort or expense in attempting to locate the defendant in Mexico” among its reasons for affirming a bond forfeiture. 208 Ariz. 368, ¶ 7, 93 P.3d at 1086. But, as mentioned, the surety’s efforts are but one factor for the trial court to consider. As the state argued below, regardless of any attempts by Guerrero

to surrender Pedroza, “the forfeiture is based on [Pedroza’s] failure to appear [at the arraignment].” And, as noted above, the trial court found that Pedroza’s flight to Mexico presented “a situation in which the actions of the defendant in failing to appear [we]re inexcusable.” Thus, even if Guerrero had turned Pedroza over to the state authorities, the trial court would have had discretion to forfeit the bond. *See Old West*, 203 Ariz. 468, ¶ 28, 56 P.3d at 49 (“[E]ven if [the surety] had arrested [the criminal defendant] after receiving timely notification of the bench warrant, exoneration of the bond would still have been discretionary with the court.”); *see also* A.R.S. § 13-3974 (“A surety *may* be relieved from liability on an appearance bond if the surety surrenders the defendant into the custody of the sheriff of the county in which the prosecution is pending and the sheriff reports the surrender to the court.”) (emphasis added).

¶13 It is clear that “sureties assume [the] risk of [a] defendant[’s] deportation in bail bond agreements involving aliens.” *Pima County CR-20031154*, 208 Ariz. 368, ¶ 4, 93 P.3d at 1085. Because Pedroza’s absence from the criminal proceedings after he voluntarily fled to Mexico was inexcusable and because the trial court carefully identified and analyzed each of the seven *Old West* factors, Guerrero has failed to establish the court abused its discretion in forfeiting the bond.¹

¹For the first time in his reply brief, Guerrero argues that he actually “surrendered” Pedroza by turning him over to federal officials and that, “[i]n any event [Pedroza’s] surrender was made impossible by [an] act of law.” Because Guerrero failed to raise those arguments in his opening brief, however, we do not address them. *See* Ariz. R. Civ. App. P. 13(c), 17B A.R.S.; *see also United Bank v. Mesa N.O. Nelson Co., Inc.*, 121 Ariz. 438,

DISPOSITION

¶14 The order and judgment of the trial court are affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge

443, 590 P.2d 1384, 1389 (1979) (arguments raised for the first time in reply brief shall not be considered).